

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

STEPHON D. BLAKE,

Defendant and Appellant.

B292475

(Los Angeles County
Super. Ct. No. BA455388)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Renee F. Korn, Judge. Affirmed.

Lynda A. Romero, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Zee Rodriguez and Noah P. Hill, Deputy
Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Stephon D. Blake (defendant) appeals from the judgment entered upon his felony conviction. He asks for a review of any in camera hearing on his pretrial discovery motion, and for remand to permit the trial court to consider his ability to pay fines and fees imposed at sentencing. As there was no in camera hearing on defendant's motion, we decline defendant's request to review. Also, since we determine beyond a reasonable doubt that remand would not produce a different result, we decline defendant's remand request. We affirm the judgment.

BACKGROUND

Defendant was charged by information with pimping, in violation of Penal Code section 266h, subdivision (a).¹ Following trial, a jury found defendant guilty as charged. On August 31, 2018, the trial court sentenced defendant to the low term of three years in prison, awarded him two days of combined presentence custody credit, and imposed the minimum mandatory fines and fees. Defendant filed a timely notice of appeal from the judgment.²

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

² We omit a factual summary, as defendant has not raised any issue requiring a review of the evidence presented at trial.

DISCUSSION

I. *Pitchess* motion³

Defendant has asked that we review any in camera hearing held pursuant to his pretrial *Pitchess* motion.⁴

Defendant's motion sought discovery of the personnel records of Los Angeles Police Officers Carrasco and White containing evidence of misconduct of any kind, based on a witness's claim that the officers periodically stopped recording her interview to say things to her.⁵ The trial court found that defendant failed to establish the necessary showing and denied the motion without prejudice. No in camera hearing to review the officers' personnel records was held. Defendant did not renew the motion. A transcript of the motion hearing was filed under seal, despite the hearing having been held in open court. After the briefs were filed, we ordered the transcript unsealed. Since there was no in camera hearing, there is nothing for this court to review.

³ See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

⁴ “[C]riminal defendants [may] seek discovery from the court of potentially exculpatory information located in otherwise confidential peace officer personnel records. If a party bringing what is commonly called a *Pitchess* motion makes a threshold showing, the court must review the records in camera and disclose to that party any information they contain that is material to the underlying case. (See Evid. Code, §§ 1043, 1045.)” (*People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 705; see Pen. Code, §§ 832.5 & 832.7.)

⁵ The witness was a prostitute who worked for defendant who did not testify at trial.

II. Ability to pay fines and fees

Defendant asks that we vacate the \$40 court operations assessment imposed pursuant to section 1465.8, subdivision (a)(1), the \$30 court facilities assessment imposed pursuant to Government Code section 70373, and the \$300 restitution and parole revocation fines imposed pursuant to section 1202.4, and that we remand the matter for a determination of his ability to pay.⁶ Defendant relies on *People v. Duenas* (2019) 30 Cal.App.5th 1157 (*Duenas*), in which Division Seven of this court held that constitutional considerations of due process and equal protection required reading into Government Code section 70373 and Penal Code section 1465.8 a procedure for obtaining a waiver of the assessments on the ground of inability to pay. (*Duenas*, at pp. 1164-1169, 1172 & fn. 10.)

In *Duenas*, the defendant was indigent and homeless, suffered from cerebral palsy, and was the mother of young children; she pled no contest to driving with a suspended license, was placed on probation, and was ordered to pay \$220 in fees and fines. (*Duenas, supra*, 30 Cal.App.5th at p. 1160.) The trial court further ordered that any amount left outstanding at the end of

⁶ At the time of defendant's sentencing, as now, section 1202.4, subdivision (d) provides in relevant part: "In setting the amount of the fine pursuant to subdivision (b) in excess of the minimum fine pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay." (§ 1204.4, subd. (d); Stats. 2017, ch. 101, § 1.)

her probation would go to collections without further order of the court. (*Ibid.*) The evidence showed that Duenas was not only unable to pay the current fines and fees, she remained liable for the court fees associated with prior misdemeanor convictions for driving without a license, which had gone to collection. (*Id.* at p. 1161.) The court held that the imposition of the fees and fines without considering the undisputed and considerable evidence of her inability to pay punished her for being poor, in violation of due process guaranteed by the state and federal constitutions. (*Id.* at pp. 1160, 1164, 1172 & fn. 10.)

The *Duenas* court relied on United States Supreme Court and California Supreme Court decisions which have held that constitutional equal protection and due process guarantees prohibit states from punishing indigent criminal defendants solely on the basis of their poverty, and thus states may not automatically revoke an indigent defendant's probation for failure to pay a fine or imprison an indigent defendant due to an inability to pay fines. (*Duenas, supra*, 30 Cal.App.5th at pp. 1166-1168; see, e.g., *Bearden v. Georgia* (1983) 461 U.S. 660, 667-668 (*Bearden*); *Griffin v. Illinois* (1956) 351 U.S. 12, 17 (*Griffin*); *In re Antazo* (1970) 3 Cal.3d 100, 116-117 (*Antazo*).) Under the reasoning of those cases, the *Duenas* court found the court's order -- that if Duenas was unable "to pay," the fine and fees 'will go to collections *without any further order from this court*' -- to be comparable to automatically revoking probation, and concluded that it was "fundamentally unfair" to use the criminal justice system to impose punitive burdens on probationers who have 'made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of [their] own' [Citation.]" (*Duenas, supra*, at pp. 1171-1172, quoting *Bearden*, at p. 668.)

The *Duenas* court went further than the cited authorities, however, concluding that the trial court erred in refusing to consider the defendant's evidence of her present inability to pay the fines and assessments prior to imposing them. (*Id.* at p. 1172 & fn. 10.) In *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*), the same court clarified its holding in *Duenas* by explaining that when a defendant presents evidence of an inability to pay fines, fees and assessments, "the defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections. [Citation.]" (*Castellano*, at p. 490, citing *Duenas*, at pp. 1168-1169.)

Respondent contends that defendant has forfeited the issue by not raising it in the trial court. Defendant counters with the "rule that although challenges to procedures . . . normally are forfeited unless timely raised in the trial court, 'this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change.' [Citations.]" (*People v. Black* (2007) 41 Cal.4th 799, 810.) Defendant points to *People v. Johnson* (2019) 35 Cal.App.5th 134, 138, and *Castellano*, *supra*, 33 Cal.App.5th at page 489, which found that *Duenas* enunciated a new "constitutional principle that could not reasonably have been anticipated at the time of trial," thus excusing any failure to object. In the alternative, defendant argues that if this court finds the issue foreseeable and thus declines to address it, then defense counsel rendered ineffective assistance by failing to raise it in the trial court.

It is debatable whether *Duenas*'s rule was or was not reasonably foreseeable. The *Duenas* court itself acknowledged that existing law prohibited the punishment of criminal defendants solely on the basis of their poverty. (*Duenas, supra*, 30 Cal.App.5th at pp. 1166-1167.) As another appellate court recently observed, "[t]he *Duenas* opinion applied 'the *Griffin-Antazo-Bearden* analysis,' [and] [t]he *Duenas* opinion likewise observed "[t]he principle that a punitive award must be considered in light of the defendant's financial condition is ancient." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 113.) The Magna Carta prohibited civil sanctions that were disproportionate to the offense or that would deprive the wrongdoer of his means of livelihood. [Citation.]' [Citation.]" (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, quoting *Duenas*, at p. 1170.) Long before *Duenas*, the Eighth Amendment to the United States Constitution, the Due Process Clause of the Fourteenth Amendment, and article I, section 17 of the California Constitution have prohibited the imposition of excessive fines and punitive awards. (See *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 727-728.)

We need not decide the forfeiture issue or the constitutional issue posited by *Duenas*, however, because we find beyond a reasonable doubt that remand to determine defendant's ability to pay the modest fines and fees imposed in this case would not yield a different result. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) Defendant points out that he told investigators after his arrest that he earned minimum wage and often slept in his car or with friends. We observe that defendant initially retained private counsel who represented him through preliminary hearing and arraignment, and that he was free on bail until

sentencing. Also, we can infer his ability to pay from probable future wages, including prison wages. (See *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397, citing *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376-1377.)⁷ Defendant argues that earning potential is irrelevant because *Duenas* called for a determination of the defendant's *present* ability to pay. Regardless, such evidence of future earning capacity is relevant to the issue of prejudice. (*People v. Johnson, supra*, 35 Cal.App.5th at pp. 139-140.) Although defendant may not be in prison long enough to discharge the debt, the record reflects that defendant was 28 years old at the time of sentencing, and that he was employed as an in-home care provider. The trial court observed that defendant was young and strong, and granted his request for a recommendation to fire camp, where he would work as a firefighter. These circumstances lead us to conclude beyond a reasonable doubt that remand would be futile, and we decline to order such an exercise in futility. (Cf. *People v. Bennett* (1981) 128 Cal.App.3d 354, 359-360 [remand for resentencing unnecessary where "the result is a foregone conclusion"].) In addition, as defendant has failed to demonstrate a reasonable probability of a different result on remand, we do not reach any claim of ineffective assistance of counsel. (See *Strickland v.*

⁷ Prison wages range from a minimum of \$12 per month to \$56 per month depending on the prisoner's skill level. (Cal. Code Regs., tit. 15, § 3041.2.) The Department of Corrections and Rehabilitation may garnish between 20 and 50 percent of those wages to pay a prisoner's restitution fine. (Pen. Code, § 2085.5, subd. (a); *People v. Ellis* (2019) 31 Cal.App.5th 1090, 1094.)

Washington (1984) 466 U.S. 668, 687; *People v. Rodrigues* (1994)
8 Cal.4th 1060, 1126.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST